United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1187

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

SID COHEN,

Appellant.

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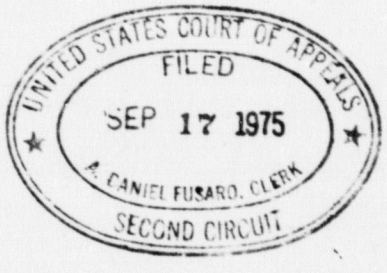
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

The appellant Sid Cohen was charged in a one-count indictment with a violation of Section 659 of Title 18, United States Code, together with co-defendants Jesse Phillips, Marvin Gelber and Bennie Segal, a/k/a Bennie Schwartz.

Prior to trial defendants Gelber and Segal pleaded guilty.

Upon a trial by jury, Mr. Cohen was convicted of the sole count with which he was charged, the Honorable Dudley Bonsal presiding. On April 28, 1975 Mr. Cohen was sentenced to two years' imprisonment, the execution of which was suspended, and four years of probation. Co-defendant Phillips was acquitted.

At the trial the proof the government offered was in the form of testimony of both civilians and agents of the Federal Bureau of Investigation.

Carl Goboff testified that he is the terminal manager for Shulman Transport Enterprise, 80 Kellogg Street, Jersey City, New Jersey. He testified generally to the shipping and paper work procedures of the company (T 15-31), which procedures do not concern the issue raised in this appeal. He also testified that he knew Mr. Cohen as an employee of Shulman for five to seven years up until 1974 (T 16).

Roger McDowell testified that he has been employed for Shulman as a tractor trailer driver for five years (T 36), that he is an auxiliary policeman, and that he knows Mr. Cohen for five years (T 37). He further testified that Mr. Cohen approached him two or three times (T 40) during March and April, 1974 and "asked me if I came across any miscellaneous freight, like freight that I was supposed to deliver and I had too much of it, to let him know and he would dispose of it for profit" (T 39, 40). McDowell further testified that Cohen told him he had somebody on 27th Street and Seventh Avenue to take the freight and pay money right on the spot (T 45, 46).

Mr. McDowell testified that on April 23, 1974 he spoke with Mr. Alex Goldberg, the assistant terminal manager at Shulman about these conversations (T 41), who then called in Mr. Gaboff (T 42). McDowell further testified: "When I told Mr. Gaboff and Mr. Goldberg they wanted to know how could they catch him in the act so I told them if he wanted

me to give him some freight I would give it to him." (T 42, 43)

McDowell testified that "Mr. Goldberg said that he would be in early the following morning to give me the freight." (T 43)

On April 24, 1974, McDowell testified, he came in to the Jersey City terminal and took the freight consisting of five cartons, and put them in his truck (T 43, 44), understanding them to be the cartons supplied by Mr. Goldberg (T 44).

McDowell testified he "then told Sid Cohen that I had something for him" (T 46, 57) and that Cohen told him to meet at 36th Street and Ninth Avenue in Manhattan, where Cohen was to pick up his helper, Jesse Phillips (T 47). Upon meeting, McDowell testified, he told Cohen to meet him at 45th Street and Lexington Avenue to unload the truck (T 47). McDowell called the company, relayed this, and went to the location. Shortly after, Cohen and Phillips arrived (T 47).

McDowell testified that he got out of his truck and told them "Here is the keys to the back of the truck" and "the cartons are on the tail end." (T 47)

Cohen and Phillips unloaded the cartons and put them in Cohen's truck and Cohen returned the keys, McDowell testified (T 48).

McDowell further testified:

" I told Sid that I didn't want any stuff about my money tonight. I said 'If I don't see you tonight I will see you in the morning.'

THE COURT: What do you mean by that, the stuff about the money? What money?

THE WITNESS: You see, after they delivered the freight to the guy he was supposed to pay them and they was supposed to have brought me the money and I was supposed to have given Sid Cohen so much of the money . . . ". (T 48)

McDowell testified that Cohen and Phillips left and he called the company to tell what had happened (T 48).

Alex Goldberg testified that he was in charge of security and operations coordination at Shulman (T 82) and that Roger McDowell told him Sid Cohen was stealing freight (T 82-84).

Goldberg testified he then contacted representatives of the FBI and Lawrence Lief, the owner of a private security firm contracted by Shulman and informed both of what had transpired (T 85).

Goldberg testified that he made the five cartons of freight available to McDowell on April 24, 1975, McDowell told him of the meeting place set with Cohen and he (Goldberg) then called and informed the FBI of the meeting place (T 85, 86). He testified to receiving a call from McDowell an hour later telling him 'it's been done' (T 86).

Goldberg further testified that the cartons had no markings on them other than "who the shipper was or the original consignee was, or the original receiver was . . . " (T 87), and that no paperwork or bills of lading were with the cartons, since he kept them (T 87, 88).

Two hours later, Goldberg testified, he received a call from the FBI stating that the arrest was made and to come and identify the cartons at the Triple Rose on the 16th Floor at 305 Seventh Avenue at the corner of Seventh Avenue in Manhattan, which he did (T 90, 91).

Agent John Good testified that on April 24, 1974, he went to the Triple Rose, spoke with Marvin Gelber, who pointed out the cartons which Mr. Goldberg later identified (T 107-113).

Lawrence Lief testified that he is employed by Industrial Security Analysts, Inc., a firm under contract to Shulman, that he spoke with Goldberg about stolen freight and that on April 24, 1974 he saw Phillips unload the five cartons from a Shulman truck and take them to 305 Seventh Avenue and exit without the packages (T 115-120). He further testified that he stopped Phillips and questioned him, who, after evasive answers, directed him to Triple Rose (T 120, 121). Lief added that he spoke with Gelber who at first denied the delivery (T 123) and then offered him $5,000 to walk away (T 137).

Marvin Gelber testified that he has been convicted of possession of stolen property (T 163) and that Sid Cohen told him in a prior conversation that he could get freight, to which Gelber replied he would pay 25 % of the invoice (T 166, 169). Gelber testified that about twelve times previously at Triple Rose, Cohen had delivered merchandise without paper work and had been paid cash accordingly (T 169, 171).

Gelber further testified that on April 24, 1974 Jesse Phillips came up and delivered the cartons and left, Phillips returned with Lief (T 173), he (Gelber) offered Lief money and he was arrested thereafter by the FBI (T 175).

Agent Joseph Pistone testified that he saw Phillips go with the cartons from the Shulman truck to 305 Seventh Avenue and that thereafter he (Pistone) went up to Triple Rose (T 195, 196). Pistone further testified that up in Triple Rose he saw the cartons in the back room and upon being directed to do so, went out and arrested Sid Cohen (T 198, 199).

After arrest, Pistone further testified, Cohen signed an advice of rights form and said he met Gelber in 1973 at which time Gelber said he would pay 25 % for overfreight, that he had sold freight to Gelber and that these five cartons were from his truck (T 203).*

* These statements by Cohen were the subject of a pre-trial suppression hearing which is not in issue in this appeal.

Agent William Kelly testified that he spoke with Goldberg on April 24, 1974 regarding theft at Shulman (T 214), that on that day he saw Cohen's Shulman Truck and then saw Cohen and Phillips unload the five cartons onto the hand truck and saw Phillips walk away with the cartons.

The interstate nature and the jurisdictional monetary value of the freight was stipulated to.

The government then rested (T 242) and the Cohen's motion to dismiss was denied (T 244).

Defendant Sid Cohen testified in contradiction to the government's contentions (T 250-329). Cohen then rested(T 348).

Defendant Phillips testified (T 350-365) and then rested (T 414).

At the end of the entire case, defendant Cohen's motion to dismiss was denied (T 414).

The defendant Cohen was found guilty upon verdict by the jury (T 521).

POINT I

THE MOTION TO DISMISS AT THE CLOSE OF THE GOVERNMENT'S CASE WAS IMPROPERLY DENIED SINCE AN ELEMENT OF PROOF OF THE OFFENSE CHARGED WAS LACKING.

This defendant was charged in this indictment* and convicted under the second or "possession" paragraph of 18 U. S. C. 659, which reads:

> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

The words 'any such goods or chattels' refers back to the first paragraph of that section, which reads:

> Whoever embezzles, steals or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any -- (places, vehicles, etc.) -- with intent to convert to his own use any goods or chattels. (which are part of interstate commerce)

In brief, any such goods refers to any goods which are stolen, embezzled or unlawfully carried away.

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* The indictment herein, in pertinent part, reads as follows: "The defendants unlawfully, willfully and knowingly did receive and have in their possession goods and chattels of a value more than $100, to wit, five cartons of wearing apparel, knowing said goods and chattels to have been embezzled, stolen and unlawfully carried away from a motor truck, vehicle, storage facility, platform and depot while said goods and chattels were moving as were part of and constituted an interstate shipment of freight, express or other property."

The fact of "stealing" is an element of the crime that must be proven to sustain this charge.

In United States v. Cohen, 274 F. 596 (3rd Cir. 1921), the court, interpreting a statute from which 18 U. S. C. 659 is derived, stated at 597:

> " To constitute 'stealing' there must be an unlawful taking and carrying away with intent to convert to the use of the taker and permanently deprive the owner."

In that case the defendant was similarly charged with knowing possession. There a cigar company delivered a case of goods to a railway express company addressed to one of its stores in Ohio. A few days later the case is seen by an employee on the express company's platform with the Ohio consignee's address erased and the address of the defendant substituted. Detectives of the railway company deliver the case to the defendant who makes unsatisfactory explanations of his reception of the case and he is arrested and convicted at trial.

The then Circuit Court of Appeals found that "the case of goods was never out of the actual physical possession of the express company until it was delivered to the defendant", expressed doubt as to "whether or not larceny was actually committed" and reversed, citing additionally other grounds.

The Court in Cohen, supra, went on at 599, to state the idea that:

> " When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and the subsequent delivery of the property by the owner or agent to a particeps criminis, . . . does not establish the crime, for in a legal sense he does not receive stolen property."

This doctrine, that when stolen goods are recovered by the owner or his agent before they are sold and therefore can no longer be considered stolen has become a "legal principle of long standing." United States v. Cawley, 255 F. 2d 338, 340 (3rd Cir. 1958).

In Cawley, supra, two thieves were arrested in the process of stealing parcel post packages from the United States mail. Upon interrogation the thieves indicated that they intended to sell the contents of the stolen parcels to defendant Cawley. The thieves agreed to cooperate and carry through the plan and in fact Cawley purchased the packages under circumstances which would justify the inference that he thought the goods were stolen.

The court there stated that the only question was whether at the time the defendant purchased the goods they had lost their character as stolen goods by reason of the previous recovery by the postal inspectors.

The court, citing, Cohen, supra, and more colorful authority beginning with Regina v. Dolan, 29 Eng. Law,

8 Eg. 533 (1855), found that when the inspectors took the packages, the goods ceased to be stolen, and the subsequent taking of the goods by defendant Cawley, even though he thought they were stolen, did not violate the statute and reversed.*

The logical rationale underlying this doctrine and these decisions is clearly that regardless of the malmotivation of the receiver, if the goods are not of a stolen character, the crime cannot be made out. Although many of the cases appear to deal with factual situations where goods are in fact stolen and then recovered, thereby losing their stolen character, the rationale must apply with equal vigor to a situation where the goods had never been stolen, thereby of necessity not having a stolen character. This indeed is the thinking of the Court in Cohen, supra, at 597, 598, when it expresses doubt that a larceny occurred at all.

In the factual setting of the case at bar, it is clear that Mr. Goldberg, who had legal authority over the

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* Cf. United States v. Egger, 470 F. 2d 1179 (9th Cir. 1972), where the court discussed the doctrine of recovered goods losing their stolen character but rejects it in the factual setting therein upon the grounds that the FBI agents in that case who were involved never actually recovered the goods but merely observed and surveilled them, thereby not calling the doctrine into play.

goods, gave them to Mr. McDowell to give to Mr. Cohen. Once possessing the goods, Mr. McDowell had legal authority to give the goods to Mr. Cohen, which he did.

Here, then, a lawful possessor gave the goods to the defendant.

It is submitted that it is factually beyond dispute that in this chain of custody from Goldberg to Cohen there was no theft and the goods did not take on a stolen character, and in fact did not possess a stolen character as they came into Cohen's hands, regardless of what was going on in Cohen's mind.

Under these circumstances it is submitted that at the point in the trial when the government rested, the defendant's motion to dismiss should have been granted for the failure of proof of one of the elements of the crime, that is, the stolen character of the goods.

In fact, this very ground was raised by counsel at that time (T 243).

The more recent case of United States v. Bryan, 483 F. 2d 88 (1973) can be readily distinguished. There, one Echols was charged with stealing (not merely receiving) 950 cases of whiskey from a pier in Philadelphia in one count, while Bryan was charged with aiding and abetting Echols. Bryan was a terminal manager of a freight line. A shipping

concern carried the whiskey consigned to the state liquor authority. An authorization to pick up the whiskey, together with a copy of the bill of lading, was sent by the consignee to Bryan's company, and these documents were placed on Bryan's desk. Later Echols appeared at the pier with these documents driving a stolen tractor disguised as one belonging to Bryan's employer. The shipping concern became suspicious of a possible hi-jack and called the dispatcher at Bryan's firm to verify. Upon being told by the dispatcher that nothing was known about the shipment, the shipping firm contacted the FBI who advised the shipping firm to release the whiskey to Echols.

Echols drove to a diner, waited an hour, made two calls, waited further and eventually returned the tractor with the whiskey to the pier of the shipper.

A polaroid photograph of a tractor of Bryan's firm, with handwriting on it describing the color scheme of the actual company tractors was found inside the cab of the stolen tractor. The handwriting was Bryan's and he admitted taking the photograph.

Echols testified. Bryan did not.

The court, sitting without jury, acquitted Echols, finding him an innocent dupe, and convicted Bryan.

On appeal the Third Circuit considered Bryan's contention that no crime was committed because the shipper

consented to Echol's taking of the whiskey although it suspected he was not authorized to do so and rejected that argument. A close reading of the court's thinking shows that the critical factor is that the shipper was not giving the shipment to Echols or Bryan individually, but rather was giving the shipment to Echols (i.e. Bryan) as the agent of the legal consignee. The court found in effect that the goods were stolen at the time they were taken by Echols (i.e. Bryan) under false pretenses. This is what gives the goods their stolen character.

In contrast, in the case at bar, McDowell, the lawful possessor, gave the goods to Cohen individually to dispose of them. There was no false pretence and therefore no stolen character to the goods, as defined in Cohen, supra. Indeed, the court in Bryan, supra, specifically states, at 91: "In cases where the lawful possessor indicated to the taker that permission was granted for the taking, a finding of commission of a crime would be unlikely."

Briefly put, the court found that Bryan (through Echols) stole the goods at the time the goods entered Echols' hands. Since the charge was stealing goods and the stolen character of the goods element of Cohen, supra, was proven, the charge was proven.

In the case at bar, Cohen, not charged with stealing but rather with receiving stolen goods, did not

at the time the goods came into his hands, receive goods that were in fact stolen. Therefore, the stolen character of the goods element of Cohen, supra, was not proven, and the motion to dismiss should have been granted at the close of the government's case.